

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
The Honorable Henry Saad, Michael Talbot, and Stephen Borrello, Presiding

RICHARD COSTA and CINDY COSTA,

Supreme Court Nos. 127334
127335

Plaintiffs-Appellants,

Court of Appeals Nos.
247983, 248104

-vs-

Lower Court No. 02 202463 NH

COMMUNITY EMERGENCY
MEDICAL SERVICES, INC.,
DAVE HENSHAW, SCOTT MEISTER,
DONALD FARENGER, and
LISA M. SCHULTZ,

Defendant-Appellees.

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**DEFENDANTS-APPELLEES LISA SCHULTZ' AND DONALD FARENGER'S
SUPPLEMENTAL BRIEF IN OPPOSITION TO PLAINTIFFS-APPELLANTS'
APPLICATION FOR LEAVE TO APPEAL**

PROOF OF SERVICE

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STATEMENT OF FACTS

On July 22, 2005, this Court issued an order directing the Court's clerk to schedule oral argument to determine whether the Court should grant any relief in connection with Plaintiffs' Application or Defendants CEMS, Henshaw or Meister's Cross-Application. That order directed the parties to include among the issues to be addressed at oral argument: (1) whether among the remedies against a party who fails to file an affidavit of meritorious defense, as required by MCL 600.2912e, is a default, and under what circumstances, if any, is such a remedy mandatory; and (2) the effect, if any, that reliance on the defense of governmental immunity has on the obligation to file an affidavit of meritorious defense under MCL 600.2912e.

The Court's order also permits the parties to file supplemental briefs that are to avoid restating arguments made in their prior briefs filed in this Court.

This is Defendants-Appellees Lisa Schultz and Donald Farenger's supplemental brief, which, with one exception, is limited to the issues raised by the Court in its order. That one exception is to point out that this Court also has directed that oral arguments be held in *Dean v Childs*, 472 Mich 853; 691 NW2d 457 (2005). Plaintiff relied on the Court of Appeals' opinion in that case in its Application, and Defendants Schultz and Farenger have explained why Plaintiff's reliance is misplaced.¹ Any decision that this Court issues in *Dean* may further support Defendants' position in this case regarding the proximate cause issue.

¹ See pages 31-32 of Defendants' Brief in Opposition to Plaintiff's Application for Leave to Appeal.

ARGUMENTS

I. What effect, if any, does reliance on the defense of governmental immunity have on the obligation to file an affidavit of meritorious defense under MCL 600.2912e?

Reliance on the defense of governmental immunity relieves governmental employees of any obligation to file an affidavit of meritorious defense under MCL 600.2912e. In addition to the arguments Defendants Schultz and Farenger have made in their Brief in Opposition to Plaintiffs' Application for Leave to Appeal, Michigan's rules of statutory construction support this conclusion.

This Court has explained that:

Statutes in *pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times, and containing no reference one to the other. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998).

In *State Treasurer, supra*, this Court determined that the at-issue pension act's nonassignment provision and the State Correctional Facility Reimbursement Act are in *pari materia* because both enactments address pensions.

Similarly, MCL 600.2912e and MCL 691.1407(2) are in *pari materia* because both enactments involve defenses to tort claims. MCL 600.2912e governs procedures for defending medical malpractice claims and includes the requirement that the defendant file an affidavit of meritorious defense setting forth his or her factual defenses to the claim and how the defendant complied with the applicable standard of care. MCL 691.1407(2) provides an immunity defense to governmental employees from *all* tort claims, including medical malpractice claims, where,

inter alia, the governmental employee's conduct does not amount to gross negligence that is the proximate cause of the injury or damage.²

When statutes are in *pari materia*, the following rules apply:

When two statutes address the same subject, courts must endeavor to read them harmoniously and to give both statutes a reasonable effect. *Endykiewicz v State Hwy Comm*, 414 Mich 377, 385; 324 NW2d 755 (1982). As this Court explained in *Rathbun [v Michigan]*, 284 Mich 521; 280 NW 35 (1938):

"The legal presumption is that the legislature did not intend to keep really contradictory enactments in the statute books, or to effect so important a measure as the repeal of a law without expressing an intention to do so. An interpretation leading to such a result should not be adopted unless it is inevitable." [284 Mich 544. Citation omitted.]

MCL 600.2912e and MCL 691.1407(2) appear to be in conflict, but no more so than when the immunity statute is applied to any other tort claim. This Court should "harmonize" MCL 691.1407(2) and MCL 600.2912e in the same manner that MCL 691.1407(2) is "harmonized" with other tort claims.

In defending against tort claims, generally, MCL 691.1407(2) relieves governmental employee defendants of having to provide *any* factual defense to the tort claim because the immunity statute bars the tort claim. More specifically, the immunity statute relieves a governmental employee of having to present any defense to a medical malpractice tort claim because the immunity statute bars that tort claim. Therefore, the immunity statute necessarily relieves a governmental employee of having to provide a factual defense in an affidavit under MCL 600.2912e. Because the tort claim does not exist, the defense procedures pertinent to that claim also logically do not exist.

² Gross negligence is defined as conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results. MCL 691.1407(2)(c).

Another rule of statutory construction of note is that, "courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002). If the Court does not interpret MCL 691.1407(2) as relieving governmental employees defendants of the obligation to file a factual affidavit of meritorious defense, the Court would, in effect, render nugatory the immunity that MCL 691.1407(2) affords to governmental employees against the burden of factually defending against a medical malpractice tort claim,. See, *Mack v City of Detroit*, 467 Mich 186, 203, n 18; 649 NW2d 47 (2002); *Mitchell v Forsyth*, 472 US 511 (1985). Accordingly, this Court should avoid any interpretation of the two statutes that would render those results. *State Farm, supra*.

Plaintiffs may claim that MCL 600.2912e's affidavit requirement will be rendered nugatory by relieving governmental employees of any obligation to file affidavits of meritorious defense. But, as explained, the immunity statute effectively renders nugatory all tort claims against governmental employees unless their conduct amounts to gross negligence that is the proximate cause of the plaintiffs' injuries. MCL 691.1407(2) necessarily also renders nugatory any specific defense procedures applicable to a particular tort claim barred by that statute. The procedure cannot exist where the claim does not exist.

The Court should conclude that MCL 691.1407(2) relieves governmental employees of any obligation under MCL 600.2912e. Alternatively, MCL 691.1407(2) and MCL 600.2912e(1)(a) can be given reasonable effect by requiring governmental employees to file affidavits of meritorious defense in medical malpractice actions, limited to factual defenses to allegations of conduct that is gross negligence that is the proximate cause of the plaintiffs' injuries, and requiring them to do so only after a Trial Court, or, if an immediate appeal is filed,

the appellate courts, conclude that the immunity statute does not bar the lawsuit.³ The affidavits should be limited in this manner because governmental employees are immune from breaches of ordinary standards of care; and, therefore, the affidavit requirements of MCL 600.2912e(1)(b)-(d) are not relevant and cannot apply. Therefore, governmental employee defendants are relieved of those requirements in all circumstances.⁴

In sum, this Court should conclude that MCL 691.1407(2) relieves governmental employees of any obligation to file affidavits of meritorious defense under MCL 600.2912e. Alternatively, this Court should conclude that governmental employees have no obligation to file an affidavit of meritorious defense unless and until the trial court, or the appellate court if an immediate appeal is filed, makes a determination that they are not entitled to governmental immunity. Such defendants then should be given a reasonable time after such determination is made to file their affidavits of meritorious defense, which are to be limited to factual defenses against allegations that their conduct amounted to gross negligence that was the proximate cause of the plaintiffs' injuries. This approach best harmonizes the two statutes and ensures that the purposes of both statutes are fulfilled.

³ MCR 7.202(6)(v) and MCR 7.203 give governmental employees the right to take an immediate appeal of right from an order denying governmental immunity. MCR 7.209(E)(4) provides for a stay of proceedings during the pendency of such appeals.

⁴ The Trial Court in this case took the reasonable approach of ordering Schultz and Farenger to file their affidavits of meritorious defense within 30 days after that Court denied their motions for summary disposition based on governmental immunity. Because the Trial Court would not enter a stay pursuant to MCR 7.209(E)(4), despite MCR 7.209(E)(4), Schultz and Farenger filed affidavits of meritorious defense. They also took this appeal, which resulted in the Court of Appeals granting leave to appeal and properly reversing the order denying their motion for summary disposition based on MCL 691.1407(2).

II. Whether among the remedies against a party who fails to file an affidavit of meritorious defense, as required by MCL 600.2912e, is a default, and under what circumstances, if any, is such a remedy mandatory?

The Court's task is to discern and give effect to the intent of the Legislature concerning any remedy for a defendant's failure to file such an affidavit. See, *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). MCL 600.2912e does not provide *any* remedy for a defendant's failure to file an affidavit of meritorious defense. In *Burton v Reed City Hospital Corp*, 471 Mich 745, 755-756; 691 NW2d 424 (2005), this Court noted the lack of such statutory remedy for a violation of the pleading requirements and explained that, "generally, the remedy against a party who 'fails to plead or otherwise defend' in an action is default." MCR 2.603(A)(1)."

MCR 2.603(A)(1) provides that, "[i]f a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules, and that fact is made to appear by affidavit or otherwise, the clerk must enter the default of that party." However, this Court found that a default under MCR 2.603(A)(1) was not available to Plaintiff Burton because he had granted the defendants two extensions of time to file their affidavits of meritorious defense. *Burton, supra* at 756. Furthermore, Burton's complaint was untimely and the defendant had asserted the statute of limitations defense in its answer to his complaint. *Id.* at 753, 755.

Thus, this Court has determined that there are circumstances that relieve defendants of their obligation to file a MCL 600.2912e affidavit and that do not require entry of a mandatory default under MCR 2.603(A)(1).

The Court of Appeals reached similar conclusions in *Kowalski v Fiutowski*, 247 Mich App 156; 635 NW2d 502 (2001) and *Wilhelm v Mustafa*, 243 Mich App 478; 24 NW2d 435

(2000.) Both opinions recognized that MCL 600.2912e neither prohibits nor requires a default when the defendant fails to file its affidavit of meritorious defense. *Kowalski, supra* at 163; *Wilhelm, supra* at 484. Both opinions concluded that a trial court has discretion to enter a default as a permissible remedy when a defendant fails to file an MCL 600.2912e affidavit, but that a trial court is not required to do so.⁵ *Kowalski, supra* at 165-166; *Wilhelm, supra* at 483-484. In its analysis, the Court of Appeals found significant the fact that the Legislature, in amending § 2912e, had eliminated the language providing that the court could strike the defendant's answer and enter a default against the defendant if the defendant failed to comply with the requirements of that section of the statute. *Kowalski, supra* at 161; *Wilhelm, supra* at 484.

Consistent with its decision in *Burton* and the Court of Appeals' decisions in *Kowalski* and *Wilhelm*, this Court should conclude that trial courts, generally, have discretion to enter a default or to fashion other remedies required to enforce the MCL 600.2912e's affidavit requirement and fulfill the purpose of that statute. In exercising that discretion, courts should take into consideration the extent to which the defendant identified his defenses with its answer, or otherwise, prior to the plaintiff complaining about the failure to file the affidavit, as well as the plaintiff's diligence in enforcing the affidavit requirement.

Kowalski, supra at 165, explained that "[t]he cooperation of *both* parties is necessary for the effective development of the meritorious issues; the plaintiff is not the only party whose involvement is necessary to ascertain the validity of the allegations made." The *Kowalski* Court

⁵ *Kowalski* and *Wilhelm* both noted MCR 2.603(A). *Kowalski, supra* at 163, relied on that rule as permissible authority for entry of a default for a defendant's failure to file an affidavit of meritorious defense. In *Wilhelm, supra* at 484, n 3, the Court of Appeals did not appear to find MCR 2.603(A) significant to its analysis, noting, instead, that a treatise writer has opined "the court's power to default the defendant under [2.603(A)] is co-extensive with the court's power of dismissal as applied to the plaintiff for failure to comply with these rules or any order of the court under MCR 2.504(B)."

explained that the statute is intended to prevent plaintiffs from bringing frivolous actions and requires defendants to present a valid defense. *Id.*

The Court of Appeals opinion in *Vandenberg v Vandenberg*, 231 Mich App 497; 586 NW2d 570 (1998), which this Court recognized in *Scarsdella v Pollak*, 461 Mich 547, 550, n 1; 607 NW2d 711 (2000), supports the conclusion that the Trial Court did not err when it did not default Schultz and Farenger in this case.

In *Vandenberg*, *supra* at 502-503, the Court of Appeals held that the harsh remedy of dismissal was not required where plaintiff did not comply with the affidavit requirement of MCL 600.2912d at the time that she filed her complaint, but subsequently served defendant with a copy of that affidavit with her complaint. That Court held that that statute's purpose in deterring frivolous medical malpractice claims was fulfilled by the method that the plaintiff advised the defendant of the merits of her claim. *Id.*

Here, Defendants Schultz and Farenger fully cooperated in determining the validity of the allegations made against them by informing the Plaintiffs of their governmental immunity defense in their first responsive pleading and then by participating in discovery and filing their motion for summary disposition, asserting their immunity defense to bar Plaintiffs' action. By raising their governmental immunity defense in their first responsive pleading, Schultz and Farenger promptly fulfilled the purpose of the MCL 600.2912e's affidavit requirement, that is, to cooperate in determining the validity of Plaintiffs' allegations.

MCL 600.2912e's purpose in having defendants identify a valid defense shortly after the plaintiffs file their action is fulfilled in cases such as the instant one where Defendants presented that valid and complete defense to Plaintiffs' action in their first responsive pleading. Moreover, as explained in the prior argument, that defense is statutory immunity afforded by

MCL 691.1407(2). That statute relieved them of any obligation to file an affidavit of meritorious defense under MCL 600.2912e and provided them with a complete defense to Plaintiffs' action. Therefore, even if available as a remedy, no default or other sanctions against Schultz and Farenger are appropriate in the instant case. See, *Vandenberg, supra*; *Kowalski, supra*.

Alternatively, this Court should conclude that Plaintiffs Costa waived or forfeited the right to rely on default as a remedy because they clearly lacked diligence in seeking default as a remedy for Defendant Schultz and Farenger's alleged failure to file an affidavit of merit in this case, which should be deemed as abandoning the right to that remedy.

This Court has held that, "a waiver sometimes 'may be shown by a course of acts and conduct, and in some cases will be implied from them.'" *Burton, supra* at 755, citing *Klas v Pearce Hardware & Furniture Co*, 202 Mich 334, 339; 168 NW 425 (1918).⁶

In the instant case, Plaintiffs did not follow the procedures set forth in MCR 2.603(A)(1) in the circuit court for entry of a mandatory default.⁷ In addition, Plaintiffs did not rely on MCR 2.603(A) in the Court of Appeals or in its current Application for Leave to Appeal to this Court. Plaintiffs' primary argument on appeal was, and is, that they were entitled to summary disposition under MCR 2.116(C)(9) because Schultz and Farenger allegedly failed to state a valid defense, (a claim that has no merit because Schultz and Farenger stated a valid statutory immunity defense).

Because Plaintiffs never sought a default from the Wayne County Circuit Court Clerk according to the procedures set forth in MCR 2.603(A)(1) and abandoned reliance on that rule in

⁶ *Burton* concluded that the defendants did not waive their statute of limitations defense where they raised the issue in their answer to plaintiff's complaint and in a summary disposition motion. 471 Mich at 755. Similarly, Schultz and Farenger did not waive their immunity defense.

the Michigan Court of Appeals and in their Application for Leave to Appeal, this Court should find that Plaintiffs waived or forfeited any right to rely on MCR 2.603(A)(1) as a basis for requiring a mandatory or permissive default in this case. See, *Wilhelm, supra* at 485; see also, *Burton, supra* at 755; MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995); *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987).

Furthermore, Plaintiffs' lack of diligence in raising the affidavit issue is also grounds for finding that Plaintiffs waived or forfeited any default remedy.

The Court of Appeals in *Wilhelm, supra* at 485, concluded that the trial court did not abuse its discretion by declining to enter a default where the plaintiff did not mention the defendant's failure to file an affidavit of meritorious defense during a lengthy period of pretrial discovery or in its final pre-trial order. *Wilhelm* also found that, under these facts, "clearly, defendant would have been severely prejudiced had the court ruled that defendant could not present witnesses or defend after two years of trial preparation." *Id.*

Here, Plaintiffs filed their Complaint in January, 2002; and, as explained, Defendants Schultz and Farenger answered and, in their first responsive pleading, informed Plaintiffs of their intent to rely on statutory governmental immunity. Plaintiffs did not ask the circuit court clerk to enter a default against Schultz and Farenger. In fact, Plaintiffs did not complain about Schultz and Farenger's alleged failure to file a MCL 600.2912e affidavit until February, 2003, which was after approximately a year of discovery and after Schultz and Farenger had already filed their summary disposition motion based on their governmental immunity defense. Thus, Plaintiffs

⁷ Instead, Plaintiffs filed a counter-motion for summary disposition and sought, as alternative relief, an order for default from the trial judge.

clearly were not diligent in seeking to enforce MCL 600.2912e's affidavit requirements. See, *Wilhelm, supra*. In addition, Defendants would have been severely prejudiced if the Trial Court had ruled that they could not assert their immunity defense after informing the Plaintiffs of that valid defense in their first responsive pleading, undertaking a year of discovery, filing a motion to enforce that defense, and doing so before Plaintiffs ever claimed that they violated MCL 600.2912e's affidavit requirement.

Also, as this Court has recognized, "[d]efault rules are intended to keep a case moving to conclusion and the rule provides for the imposition of . . . sanctions to make the rules effective. *Bigelow v Walraven*, 392 Mich 566, 581; 221 NW2d 328 (1974), citing prior rule GCR 1963, 520.4. The instant case clearly kept moving to conclusion despite Defendants' alleged failure to file an affidavit of meritorious defense. Therefore, sanctions are not appropriate against Schultz and Farenger in this case based upon an alleged violation of MCL 600.2912e.

In summary, as explained in the prior argument, because that immunity statute relieves governmental employees of MCL 600.2912e's affidavit requirement, this Court should conclude that the remedy of default is not available as a remedy. Alternatively, a default is not available unless and until such defendants fail to file affidavits of meritorious defense as ordered by the Trial Court or Court Appeals within a reasonable time after the court determines that the employee is not protected by the governmental immunity statute, MCL 691.1407(2). In those circumstances, a default would be a permissible remedy for failure to follow the Court's order. Those circumstances do not exist in the instant case. In addition, Plaintiffs, by their lack of diligence, waived or forfeited the right to any sanction in any event.

With respect to medical malpractice actions brought against non-governmental defendants, (which are not at issue here, but which the Court appears to have asked the parties to

address), because MCL 600.2912e does not provide any remedy when a defendant fails to file a timely affidavit of meritorious defense, this Court should conclude, as the Court of Appeals has, that a default is not a mandatory remedy, but is a permissible remedy. However, the Court should make clear that the harsh default remedy should be applied only in the most egregious situations and that a lesser sanction should be imposed if possible to fulfill MCL 600.2912e's purpose in requiring defendants to cooperate in development of meritorious issues and as warranted by the particular circumstances of the case.

III. If the Court concludes that a default is an available mandatory remedy and/or that MCL 691.1407(2) does not relieve Defendants Schultz and Farenger of MCL 600.2912e's affidavit requirement, the Court should apply its ruling prospectively.

Defendants recognize that the general rule is that judicial decisions are to be given retroactive effect. However, "[a] more flexible approach is warranted where injustice might result from full retroactivity." *Gladych v New Family Homes, Inc*, 468 Mich 594, 606; 664 NW2d 705 (2003), quoting *Pothutski v Allen Park*, 465 Mich 675, 696; 641 NW2d 219 (2002).

This Court considers four factors in determining whether its judicial opinions should be given prospective effect: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, (3) the effect of retroactivity on the administration of justice; and (4) whether the decision clearly established a new principle of law. *Pothutski, supra*, citing *People v Hampton*, 384 Mich 669, 674; 187 NW2d 404 (1971) and *Riley v Northland Geriatric Center (After Remand)*, 431 Mich 632, 645-646; 433 NW2d 787 (1988) (Griffin, J.)

Addressing the last factor first, prior to this case, prospective application has been found appropriate where the decision determines an 'issue of first impression whose resolution was not

clearly foreshadowed.” *People v Phillips*, 416 Mich 63, 68; 330 NW2d 366 (1982), quoting *Chevron Oil Co v Huson*, 404 US 97, 106 (1971). The sanctions issues in this case present issues of first impression for this Court. This Court has not determined the remedies available where a defendant fails to file an affidavit of meritorious defense as required by MCL 600.2912e and neither this Court nor the Court of Appeals has determined the effect of the governmental immunity statute on MCL 600.2912e’s affidavit requirement. Thus, the Court’s decision in this case will establish a new rule of law.

The purpose to be served by the new rule will be to determine remedies available where a defendant fails to file an affidavit required by MCL 600.2912e, to harmonize that statutory affidavit requirement with the statutory immunity afforded by MCL 691.1407, and to clarify how governmental employee defendants must defend medical malpractice actions against them to avoid statutory violations and possible sanctions.


Because there were no court opinions clarifying how they were to proceed, Defendants Schultz and Farenger relied upon the governmental immunity statute, which bars tort claims where, as here, the defendants’ conduct does not amount to gross negligence that is the proximate cause of the injury, to conclude that they did not have to present a factual defense to Plaintiff’s tort claims, just as other governmental employee defendants faced with tort claims have been doing for many years.

If the Court concludes that the immunity statute does not relieve governmental employee defendants of MCL 600.2912e’s affidavit requirement and/or that entry of a default is a mandatory remedy, an injustice to Defendants Schultz and Farenger will result because there was nothing to forewarn that such a decision would be forthcoming. As explained, the purpose of MCL 691.1407(2) is to protect governmental immunity defendants from having to make factual

defenses to tort claims and to protect them from those tort claims. In addition, the immunity statute bars tort claims based on breach of ordinary standards of care and retains liability only where the governmental employee's conduct amounts to gross negligence that is the proximate cause of the damages or injuries, while MCL 600.2912e affidavit requirements address only breaches of the ordinary standard of care. Furthermore, there are no exceptions to the immunity afforded by MCL 691.1407(2) for failing to file an affidavit of meritorious defense under MCL 600.2912e. Also, MCL 600.2912e does not provide any sanctions for failure to file an affidavit of meritorious defense, and the Court of Appeals has held that MCR 2.603(A) does not require entry of a mandatory default when an MCL 600.2912e affidavit was not filed, even where the defendant was not a governmental employee. Thus, Defendants were not put on notice that they potentially could lose their statutory immunity defense and face entry of a default if they failed to comply with MCL 600.2912e's affidavit requirements while relying on their immunity defense.

In the event that this Court concludes that MCL 691.1407(2) did not relieve Defendants Schultz and Farenger of MCL 600.2912e's affidavit requirement and/or mandatory default is the proper remedy when defendants fail to file an affidavit of merit, the equities in this case mandate that the Court apply those conclusions prospectively. It would be unjust to deprive those Defendants of their statutory governmental immunity defense under the circumstances of this case and in light of the prior unsettled state of the pertinent law.

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